

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ,
Plaintiff-Respondent,

V.

JOSE RAMIRO BECERRA,

Defendant-Petitioner.

Civil No. 06-CV-0950-L
Criminal No. 02-CR-1649-L

ORDER DISMISSING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255

[28 U.S.C. § 2255]

On April 26, 2006, petitioner, proceeding *pro se*, filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody following his guilty plea and sentencing in Criminal Case No. 02-CR-1649-L. Defendant was represented by counsel throughout his criminal case.

On May 24, 2002, a complaint against defendant was filed alleging defendant knowingly and intentionally imported approximately 85.94 kilograms (189.07 pounds) of marijuana, a Schedule 1 Controlled substance into the United States in violation of 21 U.S.C. §§ 952 and 960. On June 25, 2002, defendant appeared before the magistrate judge and entered a guilty plea to the charge in the Complaint. The magistrate judge recommended that the district court judge accept the plea. [doc. #9]. On February 10, 2003, the Court accepted defendant plea of guilty and sentenced defendant to 15 months in custody to be followed by three years of supervised release. Defendant did not file a direct appeal.

1 Defendant failed to self-surrender. As a result, a bench warrant was issued for
 2 defendant's arrest. Becerra was subsequently indicted for bail jump in violation of 18 U.S.C. §
 3 3146. On December 12, 2005, defendant was arrested in Texas and transported to the Southern
 4 District of California. Defendant pled guilty to one count of bail jumping on March 13, 2006.
 5 On May 8, 2006, defendant was sentenced in criminal case no. 03-CR-1998-L, to 12 month for
 6 the bail jump. The sentence was to run consecutive to the 15-month sentence entered in the
 7 present case.

8 Defendant attacks his sentence contending that his sentence must be vacated because of
 9 *United States v. Booker*, 125 S. Ct. 738 (2005) which held the federal sentencing guidelines must
 10 be advisory rather than mandatory. In order to determine that defendant's position is applicable,
 11 *Booker* must apply retroactively. It does not.

12 The government argues that the § 2255 motion must be dismissed because defendant
 13 waived his right to collaterally attack his sentence and *Booker* is not applicable in the present
 14 case.

15 **Waiver of Right to Appeal or Collaterally Attack Sentence**

16 The government contends defendant has waived his right to collaterally attack his
 17 sentence because of the written plea agreement. The plea agreement provides:

18 In exchange for the United States' concessions in this plea agreement, Defendant
 19 waives to the full extent of the law, any right to appeal or **to collaterally attack**
 20 the conviction and sentence, including any restitution order, unless the Court
 imposes a sentence in excess of the high end of the guideline range based on an
 adjusted level of 11¹. . . .

21 (Plea Agreement at 9 [doc. #14]).

22 The Court has independently reviewed the record which indicates that the plea agreement,
 23 including the waiver of the right to appeal, was entered knowingly and voluntarily, *see United*
 24 *States v. Aguilar-Muniz*, 156 F.3d 974, 976 (9th Cir. 1998) (waiver of right to appeal is valid if
 25 knowing and voluntary). The Court also finds that petitioner's motion raises no challenge to the

26
 27 ¹ The sentence imposed was consistent with the plea agreement's stipulations
 28 regarding the sentencing guidelines. Moreover, defendant did not contest the allegations that he
 violated supervised release.

1 validity of the waiver; therefore, the Court lacks jurisdiction to consider any collateral challenge
 2 to his sentence. *See Washington v. Lampert*, 422 F.3d 864, 869 (9th Cir. 2005)(recognizing that
 3 if sentencing agreement's waiver for the right to file a federal habeas petition is valid, district
 4 court lacks jurisdiction to hear the case).

5 **Retroactivity of *Booker***

6 In *Booker*, the Court explicitly changed both the sentencing statutes and Sentencing
 7 Guidelines. *United States v. Booker*, 543 U.S. 220 (2005). The Court modified the federal
 8 sentencing statute by severing and excising 18 U.S.C. § 3553(b)(1), "the provision of the federal
 9 sentencing statute that makes the Guidelines mandatory." *Id.*, at 245.

10 There is no doubt that the Supreme Court's decision in *Booker* "marked a major transformation
 11 in the law of federal criminal sentencing." *United States v. Mohamed*, 459 F.3d 979, 984 (9th
 12 Cir. 2006). The Ninth Circuit has held that *Booker* does not operate retroactively, and "does not
 13 apply to cases on collateral review where the conviction was final as of the date of *Booker's*
 14 publication." *United States v. Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005). Defendant's
 15 conviction here was the year prior to the Supreme Court's decision in *Booker*. Accordingly,
 16 defendant is not entitled to relief under 18 U.S.C. § 3582(c)(2), and not entitled to any relief
 17 under *Booker*.

18 Further, the Court cannot modify petitioners' sentences under 18 U.S.C. § 3582()(2).
 19 Section 3582(c)(2) allows the district court to modify a sentence where the applicable sentencing
 20 range has been lowered by the Sentencing Commission subsequent to the imposition of the
 21 sentence. *Booker* did not lower sentencing ranges, nor was *Booker* an action "by the Sentencing
 22 Commission"; therefore § 3582(c)(2), by its own terms, does not apply here. *See United States v.*
 23 *Moreno*, 421 F.3d 1217, 1220-21 (11th Cir. 2005).

24 **Conclusion**

25 Petitioner waived his right to collaterally attack his sentence. Moreover, even if the Court
 26 found he had not waived her right to collaterally attack his sentence, *Booker* is not applicable
 27 here and defendant is not entitled to any relief.

28 Based on the foregoing, **IT IS ORDERED** dismissing petitioner's motion to vacate, set

1 aside or correct sentence under 28 U.S.C. § 2255.

2 **IT IS SO ORDERED.**

3 DATED: January 29, 2007

4 
5 M. James Lorenz
6 United States District Court Judge

7 COPY TO:

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